TG ISKANDAR TG AHMAD

v.

SIME BANK BHD

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[BANKRUPTCY NO: 29-993-98]
27 AUGUST 2001

BANKRUPTCY: *Practice and procedure - Bankruptcy notice and petition - Whether within ambit of writ of execution - Rules of the High Court 1980, O. 46 r. 2(1)*

The judgment creditor ('JC') had earlier entered judgment in default against the judgment debtor ('JD') in 1988 but only commenced bankruptcy proceedings against the JD in 1998. This was the JC's appeal against the decision of the senior assistant registrar allowing the JD's summons in chambers to set aside the JC's petition and bankruptcy notice.

The JD, relying on O. 46 r. 2(1) of the Rules of the High Court 1980 ('RHC'), alleged that the bankruptcy notice was null and void because the JC had failed to obtain leave from the court before issuing it, as the judgment was obtained more than six years ago. The JC, apart from arguing that O. 46 r. 2(1) of the RHC was inapplicable, also averred that the limitation period to enforce the judgment in default had stopped running when the JD was adjudged a bankrupt, which happened in an unrelated case in 1990, and began to run again when the JD ceased to be a bankrupt, *ie*, in 1998. He also contended that the bankruptcy proceedings were not a form of execution within the context of writ of execution as stated in O. 46 r. 2(1) of the RHC, and therefore the absence of leave was immaterial.

Held:

[1] Bankruptcy actions do fall within the ambit of O. 46 r. 2(1)(a) of the RHC, as there were no terms, provisions or cogent reasons that excluded bankruptcy proceedings from being covered by this provision. Therefore, if more than six years have lapsed since the date of final judgment or order, any act to issue a writ of execution must require the court's leave. In the current appeal, the JC filed the bankruptcy notice without first obtaining that prerequisite leave. Hence, the bankruptcy notice was bad and the petition was equally incompetent. (pp 563g, 564b, 567c)

[1a] The six years limitation period, which started to run in 1988 would still end in 1994, as when the JD ceased to be a bankrupt in 1998, the legal effect was that the JD would be reinstated to his original position. It

was as if he had never been declared a bankrupt in 1990, and due to that retrospective effect, the limitation period would revert back and still end in 1994. (pp 566h, 567a)

[Appeal dismissed.]

Case(s) referred to:
Bell & Another v. Gosden [1950] 1 All ER 266 ***(refd)***
More v. More [1962] 1 All ER 125 ***(refd)***
Re General Rolling Stock Co [1972] LR 7 Ch App 646 ***(refd)***
Re Hj Ahmad Lazim & Ors, ex p Bank Kerjasama Rakyat (M) Bhd [1999] 2 CLJ 101 ***(refd)***
Re Ide [1886] 17 QBD 755 ***(refd)***
Re Lim Ah Hee, ex p Perwira Affin Bank Bhd [1997] 4 CLJ 462 ***(refd)***
Re Maxwell Fleet And Facilities Management Ltd (in administration) [2000] 1 All ER 464 ***(refd)***
Re Mohamad Fadzimi Yaakub, ex p UMBC [1998] 1 CLJ 783 ***(refd)***
Re Woodall [1884] 13 QBD 479 ***(refd)***
Sobri Arshad v. Associated Tractors Sdn Bhd [1991] 1 CLJ 798; [1991] 3 CLJ (Rep) 756 ***(foll)***
Wee Chow Yong v. Public Finance Bhd [1989] 3 MLJ 508 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 3(1)(i), 8(1), 93(4), 131
Bankruptcy Rules 1969, r. 92(a)
Rules of High Court 1980, O. 46 r. 2(1)(a)

For the judgment debtor - Salman Mohd Ideris; M/s Salman M Idris & Co
For the judgment creditor - Haslina Hassan; M/s Zaid Ibrahim & Co

Reported by Suresh Nathan

JUDGMENT

Suriyadi Halim Omar J:
The judgment creditor (JC) had entered judgment in default (JID) against the judgment debtor (JD) sometime on 10 December 1988. It however, had left the judgment to stand for nearly ten years, before commencing bankruptcy proceedings against the latter on 8 November 1998. Upon receiving the bankruptcy notice (BN) and the creditor's petition (CP), the JD through his counsel had filed a summons in chambers in court (encl. 13), to set them aside. The JD alleged that the bankruptcy notice was null and void, as the JC had failed to obtain leave from the court before issuing it, on the pretext that the judgment was obtained more than six years ago. The consequential effect was that the creditor's petition was also flawed and hence incompetent. I shall deal with the latter under a different but appropriate paragraph. The Senior Assistant

Registrar who had heard the summons-in-chambers application eventually decided for the JD. Being dissatisfied with the decision, the JC had lodged an appeal to the Judge in Chambers.

At the appeal stage before me, counsel for the JD had raised the same argument and had relied on O. 46 r. 2(1)(a) of the Rules of High Court 1980 (hereinafter referred to as the RHC 1980), which reads:

> (1) A writ of execution to enforce a judgment or order may not issue without leave of the Court in the following cases, that is to say:
>
> (a) where six years or more have lapsed since the date of the judgment or order ... .

On the above argument the JD alleged that as the bankruptcy notice was founded on an out of time judgment, the above provision thus applied, in that leave was required. In support of the allegation, the counsel had relied on several authorities, *inter alia*, *Re Hj Ahmad Lazim & Ors; Ex Parte Bank Kerjasama Rakyat (M) Bhd* [1999] 5 MLJ 478, with particular reference to held 3, which reads:

> ... if more than six years have elapsed since a judgment is obtained, and leave has not been obtained to execute the judgment, the judgment creditor cannot be described as being in a position to issue execution on that judgment. If execution can be issued only with leave of the court, such leave must be obtained before a bankruptcy notice can be issued thereon ... .

Apart from arguing that O. 46 r. 2(1)(a) was inapplicable, the JC also ventilated a secondary argument that the limitation period to enforce the JID, had stopped running the moment the JD was adjudged a bankrupt. To appreciate the JC's point of view, it is necessary for me to lay bare some brief facts first. The latter had entered the above-mentioned JID against the JD on 10 December 1988. On 27 September 1990 in an unrelated case, a receiving and adjudication order was successfully obtained by another creditor ie, one Yew Chin Eng @ Yew Chee Ying, against the same JD. The latter remained a bankrupt until that RO and AO against him was annulled on 16 March 1998. According to the JC the limitation period began to run again the day the JD ceased to be a bankrupt ie, on 16 March 1998.

A highly pertinent argument, intricately intertwined with the abovementioned O. 46 r. 2(1) also put forth by the JC was that, the bankruptcy proceeding was not a form of execution, which fell within the context of writ of execution of that provision. Grounded on this belief, the absence of leave as prescribed by O. 46 r. 2 thus was no cause for alarm.

The Bankruptcy Act 1967 and Rules 1969, and even the Rules of the High Court 1980 regretfully are not clear on the matter of whether a bankruptcy proceeding comes within the purview of writ of execution or not. Even case laws are hard pressed to come across with a resounding view on this issue, except for cases in the like of *Re Lim Ah Hee, ex p Perwira Affin Bank Bhd* [1997] 4 CLJ 462. In this case when interpreting O. 46 r. 2(1), Haidar Mohd Noor J (as His Lordship then was) had concluded, as per held 1 and 2:

1. Bankruptcy actions do not come within the meaning of writ of execution and there is no need to get leave under O. 46 r. 2 of the Rules of High Court.

2. A bankruptcy action, like execution proceedings, is the taking of a further step in an existing action rather than the commencement of a new action.

Slightly more cautious in approach, Edgar Joseph Jr J (as His Lordship then was) in *Wee Chow Yong v. Public Finance Bhd* [1989] 3 MLJ 508, at p. 510 para. E opined:

> I would make the preliminary observation that the issue of bankruptcy notice is not execution to enforce a judgment ... . At most, it seems to me that the issue of a bankruptcy notice may be regarded as a species of practical enforcement.

After having considered *Re Ide* [1886] 17 QBD 755 and *Re Woodall* [1884] 13 QBD 479, His Lordship decided, thus in line with the view of Haidar Mohd Noor J, that a bankruptcy action was not strictly a form of execution. Their views differed on the aspect of leave when Edgar Joseph Jr J opined that leave must be obtained in order to execute a judgment where six years or more had elapsed. At p. 510 the judge had stated:

> The judgment or order must be one on which the creditor is in the position to issue execution so that if execution cannot be issued at all, no bankruptcy notice can be issued. If the execution can be issued only with leave of the Court, the creditor must obtain such leave before he can issue a bankruptcy notice.

To wind up the sub-issue, and risking reiteration, after having considered the matter from every relevant aspect, I have no compunction in concluding that bankruptcy actions do come within the ambit of O. 46 r. 2(1)(a). Parliament has clearly seen it fit to deliberately advert to the term "include", and subject to the canon of construction, it is trite that this word in its ordinary meaning is not exhaustive. It is diametrically opposed to words like "means" which permits a hard and fast definition. Needless to say, the terminology "include" is generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute (*Interpretation Of*

Statutes by Bindra). Apart from that, I failed to identify any term, provision or cogent reason that explicitly or implicitly exclude bankruptcy proceedings from being covered by this provision, subject to all the conditions being met.

With the above mentioned O. 46 r. 2(1)(a) at the back of my mind, I would not hesitate to conclude that if more than six years have elapsed since the date of final judgment or order, any act to issue a writ of execution must require court's leave. No doubt if that judgment or order were yet to be final or leave was yet to be obtained, then at the stage of issuing the BN, the JC could not be said to be described as being in a position to issue a writ of execution.

Statutorily, what is undeniable is that a bankruptcy notice cannot stand on its own, but can only be issued if a final judgment or final order of a court exists. This is so as under s. 3(1)(i) of the Bankruptcy Act 1967 a debtor commits an act of bankruptcy, *inter alia*, if a creditor has obtained a final judgment or final order against him. This requirement is restated under r. 92(a) of the Bankruptcy Rules where, when applying for the issuance of a bankruptcy notice, an applicant creditor is required to produce before the Registrar an office copy of the judgment or order on which the notice is founded (*Re Mohamad Fadzimi Yaakub; Ex p UMBC* [1998] 1 CLJ 783). Apart from the above statutory requirement, if execution had been stayed in the like of a prior issuance of writ of seizure and sale, a writ of possession and writ of delivery, the creditor would likewise be in the same predicament, thus preventing him from filing that bankruptcy notice (s. 3(1)(i) of the Bankruptcy Act; *Re Woodall* [1884] 13 QBD 479).

I now move on to discuss the next but connected issue raised by the JC ie, pertaining to the revival of the limitation period, pursuant to the annulment of the unconnected bankruptcy action undertaken by the above mentioned Yew Chia Eng @ Yew Chee Ying.

Section 8(1) of the Bankruptcy Act 1967 reads:

> ... no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of any debt, or shall proceed with or commence any action or legal proceeding in respect of such debt unless with the leave of the Court ... .

No comprehensive dissertation is required to conclude that, by virtue of the above provision, the right of a JC to obtain remedy in respect of any debt against a JD during the bankruptcy term is suspended, unless leave of the court has been obtained beforehand.

The poser that follows in its wake is, what then if a creditor is late in filing his proof of debt, in that it is past the limitation period, after the making of the receiving order? Will leave be denied in that circumstance? To answer this question an analogical exercise will have to be undertaken. In *Re General Rolling Stock Co* [1972] LR 7 Ch App 646 a company was ordered to be wound up in February 1865, with the certificate of debts and claims filed on December 1870; and in January 1871 dividend was paid on the debts which had been established. In March 1871, the holder of bills of exchange payable in February 1865 gave the first notice of his claim and applied for leave to prove it. Unfortunately the Master of the Rolls, on the ground that the Statute of Limitation barred the debt, rejected the proof. On appeal the court viewed that as the assets were made applicable to the payment of all liabilities of the company subsisting at the date of the winding up order, the Statute of Limitation therefore did not run against a creditor. In other words, even though the applicant had filed the proof of claim late, but as the limitation factor was discounted due to the winding up order, he was at liberty to still prove his claim on the remaining assets, if any.

Even though the above case is not on all fours with the facts of the current case its importance cannot be denied. What is relevant is that, dependant upon the nature of the matter, courts may conclude whether the matter at hand may or may not be affected by 'limitation', or a moratorium on the limitation period is in place. In *Re Maxwell Fleet And Facilities Management Ltd (in administration)* [2000] 1 All ER 464), the court had occasion to succinctly state that, as regards winding up cases, the limitation period during that time would be arrested. The reasoning was that, a winding up case involved a new regime, whereby the available assets would be distributed rateably to those who had enforceable claims.

For purposes of this poser the case of *Bell & Another v. Gosden* [1950] 1 All ER 266 will also be highly enlightening.

The facts of this case in a gist were that, a law was passed in England during World War II, whereby no rent in respect of any premises in an evacuation area was recoverable during the evacuation period. Gosden had stayed at the disputed premise for a certain length of period without paying any rentals. Bell, the landlord on 4 November 1948 commenced proceedings for unpaid rents payable outside the statutorily protected period. The tenant in his defence had objected that the action had been filed way passed the limitation period. The Court of Appeal eventually held that as long as the rent was irrecoverable by law, the running of time under the Limitation Act was suspended. Time started to operate again only after that bar had been lifted. The court there had stated at p. 13:

That, I think, is a fair analogy, and it reinforces the argument on which my conclusion is based, namely, that the period of limitation set by s. 17 is regarded as a period during which the ordinary remedy exists, and, if the right to bring an action and recover is for any reason removed, then the basis on which the running of the time under the statute operates goes with it.

Having considered the niceties of the effect of an adjudication order, with the rights of the creditor being statutorily curtailed by s. 8(1) of the Bankruptcy Act 1967, there is no reason why the arguments applicable to winding up matters should not equally apply to bankruptcy matters. This is so as, *inter alia*, the available properties are vested on the official assignee, to be distributed to those who have enforceable claims. That being so it is my conclusion that during the bankruptcy term, the running of the limitation period must surely be arrested/suspended *vis-a-vis* the creditor with such claim.

Notwithstanding the above, for some good reason or other in the event a creditor fails to obtain remedy against a debtor by reason of s. 8(1) of the Bankruptcy Act 1967, the right to that remedy is however revived as soon as the bankruptcy is lifted. Simultaneously this gives rise to a revival of the previous limitation period (*More v. More* [1962] 1 All ER 125). If the final judgment or order has passed the six years period, leave is also required but pursuant to a different law ie, the said O. 46 r. 2(1)(a) of the Rules of the High Court 1980.

So, returning to the facts of this case, will leave be required by the creditor as provided for under O. 46 r. 2(1)(a) of the RHC 1980? To resolve this matter, an appreciation of the other relevant facts of the case is much needed. The creditor here had entered judgment against the debtor on 10 December 1988, and under normal circumstances, that six years period during which the creditor could enforce the judgment without leave of the court, would expire sometime on 10 December 1994. As rationalised earlier, due to the unrelated bankruptcy order from 27 September 1990 until 16 March 1998 any form of execution on that judgment thereon could only be carried out with leave of the court. Throughout this period, through no fault of it, the creditor was barred by s. 8(1) of Bankruptcy Act from issuing any form of execution against the debtor.

After much deliberation, I was of the opinion that the six years limitation period, that started to run on 10 December 1988 the day the judgment was granted, would still fall on 10 December 1994. This was due to the inescapable fact that once the annulment order of 16 March 1998 was granted, the legal effect was that the debtor would be reinstated to his original position. It is as if he had never been declared a bankrupt all the way back to 27 September

1990, with his rights and status left unblemished. With that retrospective effect and with the way clear, the limitation period will revert all the way back to 10 December 1994. That being so leave is a must. Order 46 r. 2(1) is too clear for comfort. If there were to be any exception Parliament would not have any hesitation to state so.

For the sake of justice based on acceptable grounds, like that of the current facts, no court will reject the creditor's justifiable application for leave and thenceforth permit him his remedy by enforcing the judgment (s. 93(4) of the Bankruptcy Act 1967 read together with O. 46 r. 2(1)(a)). That application of leave is imperative, as otherwise the relevant court will be unable to appreciate the reason of the delay in enforcing the final judgment or order. In the current appeal the petitioner appellant unfortunately had failed to do that. He filed that bankruptcy notice without obtaining first that prerequisite leave. With that bankruptcy notice being bad the petition likewise must be equally incompetent.

Even turning to s. 131 of the Bankruptcy Act for assistance would not cure that shortcoming here. As a successful bankruptcy proceeding would result in untold repercussions on the aggrieved party, strict compliance of the relevant provisions of the Bankruptcy Act and Rules under discussion, is a must. Any non-compliance of the prescribed statutory prerequisites must necessarily favour or benefit the aggrieved party. To wind up this point, in the case of *Sobri Arshad v. Associated Tractors Sdn Bhd* [1991] 1 CLJ 798; [1991] 3 CLJ (Rep) 756, Edgar Joseph Jr J (as His Lordship then was) had occasion to state at p. 800:

> On a concluding note, bearing in mind that bankruptcy proceedings, if successful, would have harsh and penal consequences, meticulous compliance with the law is often necessary. The case of *In Re North, ex p Hasluck* [1895] 2 QB 264 is authority for the proposition that the statute relating to the bankruptcy should be construed in a manner most favourable to the person most affected.

Based on the above reasons, at the end of the day I dismissed the bankruptcy notice and the creditor's petition with costs.